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11
12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 THE O.N. EQUITY SALES COMPANY,

15 Plaintiff,

16 v.

17 DANIEL MARIA CUI,

18 Defendant.

) Case No. C 07-02844 JSW

)
) **DEFENDANT'S REPLY**
) **MEMORANDUM OF POINTS AND**
) **AUTHORITIES IN SUPPORT OF**
) **HIS MOTION TO COMPEL**
) **ARBITRATION**

) Date: January 18, 2008

) Time: 9:00 a.m.

) Courtroom: 2, 17th Floor

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MEMORANDUM OF POINTS AND AUTHORITIES

A. Three More Judges have Denied Discovery, and Two of Them Found that ONESCO should be Compelled to Arbitrate.

In his Memorandum of Points and Authorities in Support of his Motion to Compel Arbitration (“Motion to Compel Arbitration”) (doc. 49) and his response to Plaintiff’s Objections to Magistrate’s Order Denying Discovery (“Response to Discovery Objections”) (doc. 48), Defendant Daniel Maria Cui (“Maria Cui”) told this Court that seven federal judges had compelled Plaintiff O.N. Equity Sales Company (“ONESCO”) to arbitrate, and five more had denied ONESCO’s request for discovery, while not ruling on arbitrability. Since that time, two more judges have denied discovery and found that ONESCO should be required to arbitrate. ONESCO v. Rahner, ___ F. Supp. 2d ___, 2007 WL 4258642 (D. Colo. Nov. 30, 2007); ONESCO v. Samuels, 2007 WL 4237013 (M.D. Fla. Nov. 30, 2007). Like Judge James and this Court, a third judge has denied discovery, without ruling on arbitrability. ONESCO v. Dina, Case No. 07-cv-3597-RJD-KAM (E.D.N.Y. Dec. 5, 2007) (A copy of this unpublished decision is attached as an exhibit.)

Maria Cui directs this Court to the following statements in Rahner and Samuels.

The discovery ONESCO seeks would have no impact on this determination. . . . [I]t is irrelevant that the Rahners first entered into their subscription agreements before Mr. Lancaster became associated with ONESCO. Whether Mr. Lancaster or Mr. Reese made false representations to the Rahners, or when they made them, is also irrelevant Such facts might be pertinent to the merits of the Rahners’ claims . . . , but . . . the Court is only concerned with whether the Rahners received investment services from Mr. Lancaster while he was associated with ONESCO. Such receipt of services, alone, is sufficient to render the Rahners “customers” of an “associated person” for purposes of Rule 10301.

Rahner, 2007 WL 4258642, at *5. “[A]t the pertinent times, the plaintiff was an NASD member, Lancaster was an associated person of the plaintiff, and the defendant was a customer of Lancaster. . . . [N]othing about these determinative facts . . . warrants discovery.” Samuels, 2007 WL 4237013, at *5. This Court should reach the same conclusions and compel ONESCO to arbitrate.

B. ONESCO’s Arguments Regarding Discovery Should have been Made to Judge James and in ONESCO’s Objections to her Order Denying Discovery.

At the scheduling conference on September 7, 2007, after ONESCO filed a 12-page Memorandum in Support of its Motion for Immediate Discovery (doc. 32), this Court ordered that the discovery motion be stricken, because it violated this Court’s Standing Order regarding discovery

1 procedures. (See Civil Minute Order, doc. 34) This Court referred all discovery issues to Judge
2 James. (doc. 34) Judge James denied ONESCO's request for discovery (doc. 38), and ONESCO
3 filed objections to her decision. (doc. 40) This Court ordered Maria Cui to respond to the objections,
4 limiting the response to ten pages. (doc. 43) After Maria Cui filed his ten-page Response to
5 Discovery Objections, this Court affirmed Judge James's decision. (doc. 50)

6 Now, as its Response to Maria Cui's Motion to Compel Arbitration and its Reply in Support
7 of its Motion for Preliminary Injunction ("Injunction Reply" or "Reply") (doc. 51), ONESCO has
8 filed a 15-page document devoted largely to arguing that ONESCO is entitled to discovery pursuant
9 to Federal Rule of Civil Procedure 56(f) and for other reasons, along with a seven-page affidavit
10 (doc. 52) to the same effect. Although the Injunction Reply nominally complies with the parties'
11 stipulated briefing schedule (doc. 41) as ordered by this Court (doc. 42) that the Reply not exceed
12 15 pages, it is in fact longer than 15 pages, given its lengthy single-spaced footnotes. It further
13 violates this Court's orders, because this Court referred all discovery issues to Judge James. In
14 addition, this Court's Civil Standing Order states that "no motions regarding discovery disputes may
15 be filed without prior leave of Court," and "requests for discovery relief must be summarized jointly
16 by the parties in a *joint* letter brief no longer than four pages." Defendant also observes that
17 ONESCO's recent filings, including the Injunction Reply and its affidavit, do not see the need to
18 comply with Federal Rule of Civil Procedure 5(d), which requires the attachment of certificates of
19 service. ONESCO unfortunately did not learn from this Court's striking of its earlier discovery
20 motion and has proceeded again to disregard this Court's orders and rules relating to discovery.

21 More fundamentally, ONESCO has already made its discovery arguments to Judge James
22 and in its objections to her order. Rule 56(f) and any other new arguments relating to discovery
23 should have been raised, if at all, in those filings. ONESCO's new arguments regarding discovery,
24 including its citation of Rule 56(f), are waived, and its old arguments regarding discovery are barred
25 as being merely repetitive of the arguments that Judge James and this Court have already rejected.
26 See United States v. One Parcel of Real Property, 73 F.3d 1057, 1060 (10th Cir. 1996) ("[A] party's
27 objections to the magistrate judge's report and recommendation must be . . . specific to preserve an
28 issue for . . . review by the district court . . .").

1 **C. For Arbitrability Purposes, the Pertinent Facts are Undisputed.**

2 In its Injunction Reply, ONESCO focuses on what it believes to be the timing of the
3 representations and omissions made to Maria Cui in connection with his Lancorp investments.
4 Nowhere in the dozens of pages that ONESCO has written and filed in this Court, however, does
5 ONESCO dispute that Maria Cui's initial investments were not sold until April or May 2004, after
6 Lancaster became an ONESCO employee in March 2004. Nowhere does ONESCO dispute that the
7 initial Lancorp subscription agreement was not a completed contract when signed, because it
8 imposed no obligation on Lancorp, and Lancorp could withdraw the offer at any time, prior to
9 closing in May 2004. Nowhere does ONESCO dispute that Maria Cui had no standing to bring a
10 claim at the time the initial subscription agreement was signed, because the investment was not yet
11 sold at that time. ONESCO's contentions amount to the nonsensical proposition that Maria Cui
12 cannot arbitrate ONESCO's liability for the Lancorp sales to Maria Cui, because the pertinent
13 representations and omissions were supposedly made earlier, even though ONESCO does not dispute
14 that Maria Cui could not bring a claim at the time ONESCO thinks the representations and omissions
15 were made.

16 Nowhere does ONESCO dispute that Lancaster offered Maria Cui an opportunity in April
17 2004 to get back his initial investment, before the Lancorp offering closed in May 2004 and after
18 Lancaster became an ONESCO employee. Nowhere does ONESCO dispute that Maria Cui made
19 the investment decision in April 2004 not to get back his money and to sign a reconfirmation letter,
20 attached to his Motion to Compel Arbitration as Exhibit "2," stating that he desired to remain
21 invested in Lancorp. Although ONESCO characterizes the initial Lancorp subscription agreement
22 as "irrevocable," Injunction Reply at 2, it manifestly was not irrevocable in light of Lancaster's offer
23 to refund Maria Cui's funds. Nowhere does ONESCO dispute that paragraph 39 of Maria Cui's
24 arbitration claim, attached to ONESCO's Complaint as Exhibit "C," alleges that he purchased his
25 initial investments in April 2004, while Lancaster worked for ONESCO, and thereafter made
26 additional investments. Nowhere does ONESCO dispute that Maria Cui alleges in his arbitration
27 claim that ONESCO failed to supervise Lancaster while he worked for ONESCO.

28

1 Contrary to ONESCO's assertions that Maria Cui is now offering a "slew of new factual
2 contentions," Injunction Reply at 2, Maria Cui's position in this Court is the same as it was in
3 paragraph 39 of his arbitration claim. His Lancorp investments were sold to him after Lancaster
4 started worked for ONESCO, and Maria Cui is entitled to arbitrate whether ONESCO is responsible
5 for those sales. Maria Cui has undisputedly alleged facts that occurred while Lancaster worked for
6 ONESCO on which Maria Cui may properly seek to hold ONESCO liable in arbitration.

7 ONESCO wants to focus this Court's attention on earlier representations and omissions that
8 ONESCO believes took place. ONESCO argues that claims about these earlier representations and
9 omissions, if any, as well as claims about events after Lancaster left ONESCO, should be determined
10 to be non-arbitrable. Maria Cui, however, is seeking to arbitrate about single transactions, all of
11 which occurred after Lancaster started working for ONESCO. Earlier representations and omissions,
12 if any, carried forward as part of the background for and as part of the actual sales, in the same way
13 that ONESCO may seek to introduce evidence in the arbitration about Maria Cui's financial,
14 educational, and employment history, as part of the background for his dealings with Lancaster,
15 Lancorp, and ONESCO. Similarly, whether events relating to damages occurred after Lancaster left
16 ONESCO, such as ONESCO's allegations about Lancorp's later investments in Megafund,
17 see Injunction Reply at 14-15, does not alter Maria Cui's entitlement to arbitrate whether ONESCO
18 is liable for the sales and for any damages that the sales proximately caused.

19 This Court therefore need not be concerned about ONESCO's allegations of disputed facts,
20 which pertain only to liability, not arbitrability. Besides its allegations about Megafund and the
21 representations before Lancaster started working for ONESCO, ONESCO alleges as a disputed fact
22 that Robert Reese ("Reese") was involved in the Lancorp sale to Maria Cui. See ONESCO's
23 Injunction Reply at 13-14. As Maria Cui already explained in his Motion to Compel Arbitration at
24 21-22, however, Lancaster was heavily involved in the Lancorp offering. Regardless of the nature
25 and extent of Reese's participation in the Lancorp offering and regardless of whether Lancaster used
26 Reese as an agent to contact Maria Cui, Maria Cui has alleged events performed by Lancaster while
27 he worked for ONESCO for which ONESCO may be held liable and about which they are entitled
28 to arbitrate.

1 The same conclusion applies to ONESCO's assertion that Lancaster's changes in the
2 insurance element of the Lancorp offering were immaterial. Injunction Reply at 12 n.8. Maria Cui
3 might have preferred insurance rather than the new Lancorp provision for a bank or broker-dealer's
4 assurance that the liquidation value of the securities purchased—which could later decrease—was
5 required to be greater than the amount paid. (See Exh. "2" attached to the Motion to Compel
6 Arbitration) This Court can readily see that insurance is better than a mere assurance that the
7 securities purchased can initially be liquidated for the amount paid for them.

8 ONESCO alleges as a disputed fact that Lancaster lacks credibility, because his Declaration
9 states he told ONESCO about Lancorp, but he told the NASD he did not tell ONESCO about
10 Lancorp. Injunction Reply at 13. The NASD document in question, however, states only that
11 Lancaster did not disclose specific Lancorp transactions to ONESCO, not that he did not disclose
12 his general involvement in Lancorp. This document is therefore not inconsistent with Lancaster's
13 Declaration. Moreover, Lancaster did not admit to the findings in the document, and he consented
14 to the document solely for proceedings in which the NASD was a party. In addition, given the
15 undisputed facts of Lancaster's heavy involvement in Lancorp, other issues relating to Lancaster's
16 credibility relate to the merits, not to arbitrability. "While due process certainly entitles ONESCO
17 to contest the factual claims asserted against it by the defendant, including the ability to challenge
18 Lancaster's credibility, this is precisely the kind of inquiry that is at the heart of the merits of the
19 claim and not necessary for resolution at this stage." ONESCO v. Gibson, 514 F. Supp. 2d 857, 863
20 (S.D.W. Va. 2007).

21 In this connection, ONESCO's citation of Bensadoun v. Jobe-Riatt, 316 F.3d 171 (2d Cir.
22 2002), is not on point. In Bensadoun, the broker denied having any contact with the investors in
23 connection with the investment at issue, and the Second Circuit determined that a factual question
24 was created about whether the investors were the broker's customers. Here by contrast, Lancaster
25 had direct contact with Maria Cui in connection with Lancorp while he worked for ONESCO, as
26 evidenced by the reconfirmation letter he sent in April 2004. For purposes of ONESCO's NASD
27 arbitration obligation under Rule 10301, Maria Cui was unambiguously Lancaster's customer in
28

1 connection with his Lancorp activities while he worked for ONESCO. This point is by itself
2 dispositive of the arbitrability issue in this case.

3 Contrary to ONESCO's repeated assertions, whether Lancaster was credible or whether the
4 changes in the Lancorp offering were material or different from those made earlier—or, indeed,
5 whether Lancaster made any new representations after he became an ONESCO representative that
6 were material or different from those made earlier—is pertinent at best only to liability, not to
7 arbitrability. Even assuming *arguendo* that all of ONESCO's factual allegations on these issues on
8 which it hopes to discover supporting evidence are true, Maria Cui can still arbitrate, because his
9 allegations still satisfy the requirements for arbitrability under NASD Rule 10301. First, he was an
10 ONESCO customer through Lancaster, because a customer under NASD Rule 10301 is anyone who
11 is not a broker or dealer. Multi-Financial Sec. Corp. v. King, 386 F.3d 1364, 1368 (11th Cir. 2004)
12 (“The NASD generally defines the term ‘customer’ as anyone who is not a broker or a dealer.”).
13 “[U]nder the NASD Code, when the investor deals with an agent or representative, the investor deals
14 with the member, and on that basis the investor is entitled to have resolved in arbitration any dispute
15 that arises out of that relationship.” Vestax Sec. Corp. v. McWood, 280 F.3d 1078, 1082 (6th Cir.
16 2002). Second, he has alleged that ONESCO failed to supervise events occurring in connection with
17 his Lancorp investments while he was Lancaster's customer and while Lancaster worked for
18 ONESCO. “A dispute that arises from a firm's lack of supervision over its brokers arises in
19 connection with its business,” for purposes of this requirement for arbitrability under NASD Rule
20 10301. *Id.* at 1082 (citation omitted).

21 ONESCO is improperly attempting to convert liability issues into arbitrability issues. For
22 arbitrability purposes under NASD Rule 10301, the pertinent facts are undisputed.

23 [W]e are unconcerned with MONY's cornucopia of disputed facts. Instead, we focus
24 on those facts required to satisfy . . . [the] two-part test [for arbitrability under Rule
25 10301]. So while there may be dozens of disputed facts, the facts that matter in this
26 case are undisputed: the Bornsteins were customers of Keller, who was an associated
27 person of MONY. This undisputed fact pattern is somewhat common, and the
28 overwhelming response is that the case is subject to arbitration. More importantly,
this fact pattern falls wholly within the clear language of Rules 10101 and 10301,
which focus first on whether the investor is a customer, and second on whether the
dispute arose in connection with the business of the member.

1 MONY Sec. Corp. v. Bornstein, 390 F.3d 1340, 1346 (11th Cir. 2004) (citations omitted). Because
 2 the requirements for arbitrability under Rule 10301 are satisfied, Section 4 of the Federal Arbitration
 3 Act, 9 U.S.C. § 4, mandates that this Court summarily compel arbitration, without delay for
 4 discovery and a two-day evidentiary hearing.

5 **D. This Court must Apply a Presumption of Arbitrability.**

6 ONESCO continues not to understand that the issue in this case is the scope of NASD Rule
 7 10301, not its existence. See Injunction Reply at 7-8. ONESCO concedes that NASD Rule 10301
 8 exists and is binding on ONESCO. The issue is whether this undisputedly valid arbitration
 9 agreement applies to the disputes between ONESCO and Maria Cui. This issue is by definition an
 10 issue of scope, not of existence.

11 Furthermore, the disputed issue in this case is not whether Maria Cui was a customer of
 12 Lancaster, because he clearly was. Instead, the disputed issue, according to ONESCO, is whether
 13 he was a customer at the right time to be entitled to enforce Rule 10301. Timing questions are
 14 subject to a presumption of arbitrability. Kristian v. Comcast Corp., 446 F.3d 25, 35 (1st Cir. 2006).

15 In Washington Square Sec., Inc. v. Aune, 385 F.3d 432, 435 (4th Cir. 2004) (citations
 16 omitted), the Fourth Circuit applied this presumption to Rule 10301.

17 We address first the district court's finding that no presumption in favor of
 18 arbitration applied in this case because the Investors and [the brokerage firm] never
 19 entered into an agreement to arbitrate [under NASD Rule 10301]. . . . We find . . . the
 reasoning of the district court unpersuasive.

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21 . . . The NASD Code constitutes an "agreement in writing" under the Federal
 22 Arbitration Act, 9 U.S.C. § 2, which binds . . . an NASD member[] to submit an
 23 eligible dispute to arbitration upon a customer's demand. Because this arbitration
 agreement binds Washington Square, the remaining issue is whether the Investors are
 "customers" whose dispute falls within its scope.

24 This Court must therefore apply a presumption of arbitrability to the scope issue in this case.

25 **E. Summary Judgment Procedures Do Not Apply.**

26 ONESCO argues that summary judgment procedures should apply to the arbitrability issue
 27 in this case, including entitlement to discovery under Rule 56(f) and the benefit of reasonable doubts
 28 in favor of the nonmoving party. Even if Rule 56(f) did apply, the undisputed facts show that
 discovery is not needed. See State ex rel. Cal. Dept. of Toxic Substances Control v. Campbell, 138

1 F.3d 772, 780 (9th Cir. 1998) (rejecting the defendants’ reliance on Rule 56(f), because “the facts
2 that the defendants hope to elicit during discovery are not essential to resisting [the] summary
3 adjudication motion”).

4 Moreover, as stated in more detail in Maria Cui’s Response to Discovery Objections (doc.
5 48) at 5-6, under Section 6 of the Federal Arbitration Act, 9 U.S.C. § 6, Appellees’ motion to compel
6 arbitration is properly treated as a motion. Summary judgment procedures under Rule 56 apply only
7 to complaints, not to motions. Parties cannot seek summary judgments on motions. Accordingly,
8 Rule 56(f) and other summary judgment procedures do not apply to this case.

9 Although ONESCO cites cases treating motions to compel arbitration similarly to motions
10 for summary judgment, because both types of motions call for summary dispositions, no case states
11 that the specific procedural requirements of Rule 56, such as subdivision (f), are applicable to
12 motions to compel arbitration. To the contrary, in Umbenhowe v. Copart, Inc., 2004 WL 2660649
13 (D. Kan. Nov. 19, 2004), cited by ONESCO, the court did not apply Rule 56 authentication
14 requirements to motions to compel arbitration. “[T]his court has found no appellate cases extending
15 the Rule 56 requirement that the parties submit evidence in a form that would be admissible at trial
16 into the context of a motion to compel” arbitration. Id. at *6 n.4. Similarly, in Brown v. Dorsey &
17 Whitney, 267 F. Supp. 2d 61 (D.D.C. 2003), which treated a motion to dismiss as a motion to
18 compel arbitration, the court did not apply the notice requirements that would ordinarily apply when
19 a motion to dismiss is converted to a motion for summary judgment. “[T]he Court is not actually
20 affecting a conversion for review under Rule 56, but is rather construing the motion for what it really
21 is—a motion to compel arbitration” Id. at 67.

22 Many of the cases discussing summary judgment in the context of motions to compel
23 arbitration do so only in dicta or in connection with the making of an arbitration agreement. See,
24 e.g., Umbenhowe, 2004 WL 26604649, at *6 (challenge to authenticity of the plaintiff’s signature
25 on the arbitration agreement); Tinder v. Pinkerton Sec., 305 F.3d 728, 735-36 (7th Cir. 2002)
26 (Employee alleged she never saw the arbitration agreement.); Par-Knit Mills, Inc. v. Stockbridge
27 Fabrics Co., 636 F.2d 51 (3d Cir. 1980) (Production manager’s signature was allegedly only a
28 confirmation of delivery dates, not an agreement to arbitrate.). When the issue, unlike this case, is

1 whether an arbitration agreement was made at all, a discussion of summary judgment can
2 appropriately focus attention on whether summary resolution is possible and whether meaningful
3 factual disputes relating to the making of the agreement exist. Even in this circumstance, however,
4 to facilitate the national policy favoring arbitration, the facts should be viewed in the light most
5 favorable to arbitration or at least neutrally, rather than in the light favorable to the non-moving
6 party.

7 In this case, in his Motion to Compel Arbitration at 18-21, Maria Cui explained in detail that
8 the issue is not the making of NASD Rule 10301, but its scope, to which a presumption of
9 arbitrability applies. Unlike motions to compel compliance with an arbitration agreement, for which
10 this Court must resolve all doubts about the scope of the agreement in favor of arbitration, the facts
11 for summary judgment motions are “viewed in the light most favorable to the nonmoving party,”
12 albeit “only if there is a ‘genuine’ dispute as to those facts.” Broderson v. Harris, 127 S. Ct. 1769,
13 1776 (2007). Thus, the presumption resolving doubts about the scope of arbitration agreements in
14 favor of movants seeking to compel arbitration differs from the standard applicable to summary
15 judgment motions, which requires court to view the facts in the light most favorable to the
16 nonmoving party. Because the Federal Arbitration Act and Rule 56 standards of review are different,
17 Rule 56 standards do not appropriately apply to the scope question in this case.

18 Even if Rule 56 standards do apply, Maria Cui is entitled to summary disposition. Under
19 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252-53 (1986), trial courts, when ruling on summary
20 judgment motions, must apply “the substantive evidentiary standard of proof that would apply at a
21 trial on the merits” and must “view the evidence presented through the prism of the substantive
22 evidentiary burden.” Here, the “substantive evidentiary burden” requires resolution of doubts in
23 favor of arbitration. Because the only question is whether doubts exist, this question is inevitably
24 susceptible to summary determination without trial.

25 The court in First Montauk Sec. Corp. v. Four Mile Range Development Co., 65 F. Supp. 2d
26 1371 (S.D. Fla. 1999), adopted this analysis in granting summary judgment to an investor on the
27 customer issue under NASD Rule 10301. “The Court concludes that the ‘substantive evidentiary
28 burden’ is applicable to this action and involves the scope of written agreements to arbitrate.

1 Therefore, unless the Court can say with positive assurance that the arbitration provisions at issue
2 are not susceptible of an interpretation in favor of arbitration, the Court must find in favor of
3 arbitration.” Id. at 1377.

4 In this instance, Maria Cui has cited numerous cases holding on facts substantially identical
5 to those in the present case that Lancorp investors are entitled to arbitrate with ONESCO. Plainly,
6 NASD Rule 10301 is at least susceptible to this interpretation. Consequently, even if summary
7 judgment principles are properly applied in this case, Maria Cui is entitled to summary judgment.

8 WHEREFORE, Maria Cui respectfully requests this Court to deny injunctive relief and to
9 compel arbitration.

10 Respectfully submitted,

11 DATED: December 19, 2007

GOODMAN & NEKVASIL, P.A.
By: /s/ Joel A. Goodman
Joel A. Goodman
Attorney *pro hac vice*

LAW OFFICES OF CARY S. LAPIDUS
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16 **CERTIFICATE OF SERVICE**

17 I hereby certify that on December 19, 2007, Pacific Standard Time, I electronically filed the
18 foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such
19 filing to the e-mail addresses denoted on the Electronic Mail Notice List below.

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